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International Environmental Law Gets Its Sea Legs: Hazardous Waste Dumping Claims Under the ATCA

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PROLOGUE: HAZARDOUS WASTE CRISIS IN CÔTE D'IVOIRE

The *Probo Koala*,[1] a ship chartered by Trafigura Beheer BV, a Dutch commodities trading company, docked in Abidjan, the capital of Côte d'Ivoire, on August 19, 2006,[2] to dispose of highly toxic "slops"—hazardous waste created when oil tanks are washed out with caustic soda.[3] The ship offloaded the slops into trucks, ostensibly owned by a "certified local company, Compagnie Tommy."[4] The trucks then fanned out around the capital, dumping at least 500 tons of petrochemical waste[5] into at least 15 sites.[6] The slops contained hydrogen sulfide, which in concentrated doses is potentially lethal.[7] Residents were soon struck by the stench of rotten eggs[8] and began suffering from "nosebleeds, nausea and vomiting, headaches, skin and eye irritation and respiratory symptoms."[9] Ground water supplies and other drinking water systems were contaminated.[10] As of November 24, 2006, the waste had killed at least twelve people and led over 100,000 individuals to seek medical care.[11]

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1. Lydia Polgreen & Marlise Simons, *Globalization's Toxic Side*, INT'L HERALD TRIB., Oct. 3, 2006, at 1. The *Probo Koala* was "a Greek-owned tanker flying a Panamanian flag . . . leased by the London branch of a Swiss trading corporation whose fiscal headquarters are in the Netherlands." *Id.*

2. Associated Press, *Toxic Waste that Sickened Ivory Coast Arrives in French Port*, INT'L HERALD TRIB., Nov. 7, 2006, *available at* http://www.iht.com/articles/ap/2006/11/07/europe/EU_GEN_France_Ivory_Coast_Waste.php.

3. BBC News, *More Die from Ivory Coast Waste*, Sept. 12, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/5335956.stm (last visited Nov. 15, 2007).

4. *Id.*

5. U.N. News Serv., *Côte d'Ivoire: UN Helps Country Assess Impact of Deadly Toxic Waste Dumping on Food Chain*, Oct. 23, 2006, http://allafrica.com/stories/200610231256.html (last visited Nov. 15, 2007) ("The waste contained a mixture of petroleum distillates, hydrogen sulphide, mercaptans, phenolic compounds and sodium hydroxide . . . .").

6. *Id.*

7. Associated Press, *supra* note 2.

8. Polgreen & Simons, *supra* note 1.

9. U.N. News Serv., *supra* note 5.

10. News Release, U.N. Env't Programme, Donor Governments Should Support On-Going Côte d'Ivoire Emergency, UNEP NEWS RELEASE (Dec. 14, 2006), *available at* http://unep.org/Documents. Multilingual/Default.asp?DocumentID=496&ArticleID=5453&l=en.

11. *Côte d'Ivoire: UN Ecology Chief Calls for International Funds to Clean Up Toxic Dumping*, U.N. DAILY NEWS, Nov. 24, 2006, at 6, *available at* http://www.un.org/ news/dh/pdf/english/2006/24112006.pdf.

These hazardous wastes traveled thousands of miles to Côte d'Ivoire from Amsterdam, where the *Probo Koala* first attempted to dispose of its slops. When Amsterdam Port Authorities realized that the waste was highly toxic, they informed Trafigura Beheer that the proper disposal of the waste would cost $250,000. The company balked at the cost and, with the permission of the Amsterdam Port Authorities, reloaded the slops onto their ship and set sail for a cheaper port.[12] The hazardous wastes were eventually dumped in apparent violation of international law.[13] There has been no indication that Trafigura received Côte d'Ivoire's consent to receive and dispose of its slops, and Côte d'Ivoire does not have facilities capable of handling high-level toxic waste.[14]

INTRODUCTION

Under current international legal precedent, victims injured by dumping of hazardous waste in Côte d'Ivoire, as well as those harmed by similar egregious environmental torts, may well go uncompensated. Although African nations have characterized hazardous waste dumping as "a crime against Africa and the African people,"[15] the judiciaries in developing countries like Côte d'Ivoire are seldom equipped to provide relief, and illegal dumping has the potential to cause major political and civil unrest. Consider that the Côte d'Ivoire dumping led to a virtual collapse of the government. Allegations that the government was corruptly involved with the dumping fueled rioting, spurred originally by the government's slow and limited response to the crisis. The President disbanded his cabinet.[16] Although many of the ministers were later reinstated, both the transport and

12. Polgreen & Simons, *supra* note 1.

13. U.N. hazardous waste expert Rudolph Walder stated, "It is very clear to me that this product violates the Basel convention." U.N. Integrated Reg'l Info. Networks, *Côte d'Ivoire: French Executives Arrested in Toxic-Waste Scandal*, ALLAFRICA.COM, Sept. 19, 2006, http://allafrica.com/stories/200609190832.html. "Dumping" is the illegal disposal of hazardous waste.

14. Polgreen & Simons, *supra* note 1.

15. C. Russell H. Shearer, *Comparative Analysis of the Basel and Bamako Conventions on Hazardous Waste*, 23 ENVTL. L. 141, 149 (1993).

16. Lydia Polgreen & Marlise Simons, *Global Sludge Ends in Tragedy for Ivory Coast*, INT'L HERALD TRIB., Oct. 2, 2006, at 1 ("The spreading illnesses sparked violent demonstrations from a population convinced that government corruption was to blame for the dumping, and ultimately the furor forced the prime minister and his government to resign in September, though much of the government was reinstated later. Six Ivorians, one Nigerian and two European officials from Trafigura have been jailed so far in Ivory Coast.").

environmental ministers were replaced.[17] While this particular political crisis may not speak directly to the judiciary, it indicates the potentially volatile nature of governments in countries likely to be abused by illegal dumping. Such volatility is only one hurdle among many rendering plaintiffs "little hope of recovery" in their home countries.[18]

The dumping of hazardous waste is a violation of international law with serious public health and environmental consequences, yet courts like those in Côte d'Ivoire may not be able to adequately defend their victimized populace. Plaintiffs in developing nations face "lack of democratic governance, inadequate environmental legislation, limited tort law, and low potential amounts granted from judgments."[19] In the Côte d'Ivoire crisis, the President reportedly accepted a deal from Trafigura, wherein the company would pay $152 million toward the clean up costs without ever accepting either liability or responsibility for dumping the toxic wastes.[20] In exchange for the money, the President dropped charges against Trafigura and its executives.[21] However, there is no reason to assume that in future dumping

17. *See* U.N. Integrated Reg'l Info. Networks, *supra* note 13.

18. Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 340 (1997).

19. *Id.*

20. Press Release, Greenpeace Int'l, *Greenpeace Condemns Trafigura-Côte d'Ivoire Deal as Travesty of Justice* (Feb. 14 2007), http://www.greenpeace.org/international/press/releases/greenpeace-condemns-trafigura.

21. *Id.* The preclusive effect of government settlements on private party claims varies as a matter of national law. *See, e.g.*, Bi v. Union Carbide Chems. & Plastic Co., 984 F.2d 582, 586 (2d Cir. 1993) (deferring "to the statute of a democratic country to resolve disputes created by a disaster of mass proportions that occurred within that country" and holding that "[a]ny challenge appellants may have to the settlement must be made through the legislative or judicial channels that are available in India."). U.S. case law indicates that the government can settle private claims without effecting an unconstitutional taking because the government "may provide the claimants with benefits that justify the taking, and therefore fulfill the 'just compensation' requirements of the Constitution." Maria Gabriela Bianchini, Comment, *The Tobacco Agreement that Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, 87 CAL. L. REV. 703, 737 (1999); *see* Shanghai Power Co. v. United States, 4 Ct. Cl. 237, 244 (1983) ("Because a government's refusal to honor debts owed a foreign national is frequently symptomatic of more serious problems between the two countries, governments have traditionally espoused and settled claims without the consent of the nationals holding the claims and 'usually without exclusive regard for their interests, as distinguished from those of the nation as a whole.'" (citation omitted)); *see also* Carter H. Strickland, Jr., Note, *The Scope of Authority of Natural Resource*

crises, governments would be able to reach any sort of settlement with the tortious company. Even if the government manages to settle, "it is feared that the victims will . . . receive little, if any, support from their government in pursuing justice."[22]

However, there may be a light at the end of the tunnel for these and similarly situated victims.[23] The Alien Torts Claims Act (ATCA) provides U.S. district courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[24] Under ATCA precedent, aliens may bring claims against both U.S. and *foreign* defendants, provided that the U.S. court has personal jurisdiction over the defendant.[25] Accordingly, the ATCA provides an opportunity for the victims of injustice to seek redress in U.S. courts.[26]

Trustees, 20 COLUM. J. ENVTL. L. 301, 322 (1995) ("[U]nder ordinary res judicata rules, [government] settlement of CERCLA claims would preclude private common law claims arising from the same event."). *See generally* Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354 (2000); Jennifer Joseph, Comment, *POWs Left in the Cold: Compensation Eludes American WWII Slave Laborers for Private Japanese Companies*, 29 PEPP. L. REV. 209, 213-14 (2001) ("Harold G. Maier, professor of International Law at Vanderbilt University, claims: 'It is unclear whether the United States government has the authority to waive private law claims by the former POWs against private Japanese entities as part of a government-to-government settlement. Normally a party cannot waive claims that it does not own.'").

22. Greenpeace Int'l, *supra* note 20.

23. The Basel Convention does not, itself, authorize a private right of action by tort plaintiffs. Rather, the Basel Convention serves as evidence for a "law of nations" against dumping. The Alien Tort Claims Act would provide plaintiffs seeking to recover for injuries caused by dumping a right of action in U.S. courts. *See* Abdullahi v. Pfizer, Inc., No. 01 Civ.8118 (WHP), 2005 WL 1870811, at *9 (S.D.N.Y. Aug. 9, 2005) (recognizing that under the ATCA "federal courts have the authority to imply the existence of a private right of action for violations of *jus cogens* norms of international law"); *cf.* Lisa T. Belenky, *Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law*, 17 BERKELEY J. INT'L L. 95, 133 (1999) ("Under the Basel approach the waste is either reshipped or disposed of properly, but no compensation is made to the country that received the illegal wastes or to the importer who may have significant damages, shipping costs, opportunity costs, or direct damages from the waste. In addition, no compensation is made to other individuals whose property or health may have been harmed by the lack of proper environmental safeguards.")

24. Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2000).

25. *See* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp 162 (D. Mass.

In order for victims of environmental torts to successfully seek redress under the ATCA, U.S. courts will need to recognize an environmental law of nations.[27] Thus far, the ATCA has primarily been used as a means of redress for the victims of human rights violations.[28] Courts have heard ATCA cases involving claims of environmental torts but have yet to recognize a law of

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1995). For a discussion of personal jurisdiction over foreign defendants in ATCA suits, see Sarah M. Hall, Note, *Multinational Corporations' Post-*Unocal *Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401, 406-08 (2002).

26. 28 U.S.C. § 1350 (2000).

27. Plaintiffs might also be able to bring suit under the ATCA treaty clause. However, the treaty clause has, as of yet, been largely ignored by courts. For further discussion of the plausibility of suits under the treaty prong, see Belenky, *supra* note 23. *See also* Kristen D.A. Carpenter, *The International Covenant on Civil and Political Rights: A Toothless Tiger?*, 26 N.C. J. INT'L L. & COM. REG. 1 (2000); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002). Previously, scholars seeking to promote the ATCA as a forum to address environmental torts have focused on the efficacy of structuring environmental tort claims such that they were similar to other alleged human rights abuses. Even when Professor Hari Osofsky argued convincingly that "environmental human rights have developed sufficiently to be used as a basis for suits under the Alien Tort Statute," the core of her argument rested on the strength of indigenous people's environmental human rights. Thus, although Professor Osofsky explored a welcome, growing recognition of environmental torts in the international law arena, she continued to structure environmental claims as secondary to and dependent upon human rights claims. Osofsky, *Environmental Human Rights Under the Alien Tort Statute*, *supra* note 18, at 339-40. For further discussion of the relationship between environmentalism and indigenous rights, see S. James Anaya, *Environmentalism, Human Rights and Indigenous Peoples: A Tale of Converging and Diverging Interests*, 7 BUFF. ENVTL. L.J. 1 (2000). *Cf.* Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71 (2005) (proposing a new advocacy model in environmental justice for environmental harm to humans).

28. Although the ATCA was codified in 1789, it did not come into use until the 1980s. *See* Joanna E. Arlow, Note, *The Utility of ATCA and the "Law of Nations" in Environmental Torts Litigation:* Jota v. Texaco, Inc. *and Large Scale Environmental Destruction*, 7 WIS. ENVTL. L.J. 93, 106 (2000) (noting that in 1980, the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), revived the Act and established its connection with international human rights law). *See generally* Lucien H. Dhooge, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT'L L. 3 (2003).

nations violation.[29] Rather, courts have found that references to the Stockholm Principles[30] or to the principles of international environmental law (the Polluter Pays Principle, the Precautionary Principle, and the Proximity Principle)[31] did not set forth specific proscriptions or enjoy consensus among the international community. U.S. courts have thus far rejected the concept of a general environmental law of nations—a law of nations based on a vague international sense of responsibility toward the environment. For U.S. courts to recognize an environmental law of nations, the law of nations must be both supported by international consensus and explicitly defined.

This Note argues that there is international consensus against dumping hazardous waste in developing countries such that the norm against dumping qualifies as a law of nations violation actionable under the ATCA. The international consensus against dumping is demonstrated by numerous treaties and multitudes of domestic legislation. Most notably, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention),[32] a multilateral treaty ad-

29. *See, e.g.*, Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003); Beanal v. Freeport-McMoran, Inc. (*Beanal II*), 197 F.3d 161, 167 (5th Cir. 1999); Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534 (S.D.N.Y. 2001); Beanal v. Freeport-McMoran, Inc. (*Beanal I*), 969 F. Supp. 362, 370 (E.D. La. 1997); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991).

30. *See Amlon Metals*, 775 F. Supp. at 671 (holding that invocations of the Stockholm Principles, United Nations Conference on the Human Environment, adopted June 16, 1972, "do not establish a violation of such law under the Alien Tort Statute . . . since those Principles do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders").

31. *See Beanal I*, 969 F. Supp. at 384 ("The three principles relied on by Plaintiff, standing alone, do not constitute international torts for which there is universal consensus in the international community as to their binding status and their content." (citation omitted)); *see also Beanal II*, 197 F.3d at 167 ("The sources of international law cited by Beanal and the *amici* merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts.").

32. Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention]; *see* Daniel Jaffe, Note & Comment, *The International Effort To Control the Transboundary Movement of Hazardous Waste: The Basel and Bamako Conventions*, 2 ILSA J. INT'L & COMP. L. 123, 127 (1995) ("The Basel Con-

ministered by the United Nations Environment Programme (UNEP),[33] defines the norm against dumping by expressly prohibiting dumping hazardous waste. The Basel Convention requires in Article 4(1)(c) that parties "shall prohibit or shall not permit the export of hazardous wastes and other wastes if the State of import does not consent in writing to the specific import, in the case where that State of import has not prohibited the import of such wastes." The Basel Convention further requires that parties "[e]nsure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that shall be located, to the extent possible, within it, whatever the place of their disposal . . . ."[34] The Basel Convention and the ongoing Basel Convention Secretariat—particularly when viewed in combination with the Bamako Convention,[35] laws adopted by many countries to implement the Basel Convention, and a range of international accords prohibiting dumping—demonstrate that the dumping of hazardous wastes is a violation of established international law.[36] Moreover, dumping is a tort under U.S. law.[37] Therefore, aliens in-

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vention's goal was to establish a global framework for the movement of hazardous waste. The Basel Convention does not call for a complete ban of hazardous waste exportation, rather it attempts to regulate it." (citations omitted)).

33. "UNEP makes important global environmental contributions in a number of areas. It brings scientists together to make independent assessments of environmental problems at the global and regional levels. It catalyzes key environmental negotiations . . . . It makes data available to environmental ministries. . . . It furthers the development of international environmental law." Elizabeth Dowdeswell & Steve Charnovitz, *Globalization, Trade, and Interdependence, in* THINKING ECOLOGICALLY 91, 98 (Marian R. Chertow & Daniel C. Esty eds., 1997).

34. Basel Convention art. 4.1(c), *supra* note 32, at 131.

35. Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, 2101 U.N.T.S. 177 [hereinafter Bamako Convention]. The Bamako Convention was adopted by the Organization of African Unity (OAU) to place a total ban on the exportation of waste into Africa. *See* Jaffe, *supra* note 32, at 131. Article 4(3)(b) provides for unlimited liability, as well as joint and several liability, to punish violators of the Bamako Convention. *See* Joseph F. St. Cyr, *The International Jurisprudence and Politics of Hazardous Substances: Managing a Global Dilemma*, 12 BUFF. ENVTL. L.J. 91, 110 (2004).

36. Shireen Irani Bacon, Note, *Up in Smoke: The Need for International Regulation of Hazardous Waste Incineration*, 29 TEX. INT'L L.J. 257, 259 (1994) ("A hallmark of international concern [for the environment] is the treatment of hazardous waste, as evidenced by the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) by over one hundred countries.")

jured by dumping can seek relief under the law of nations prong of the ATCA.[38]

In order to demonstrate, first, that the anti-dumping norm is a contemporary iteration of the law of nations and, second, that this norm should allow the courts solid grounds on which to recognize international environmental law under the ATCA, this Note will proceed as follows: Part I outlines how contemporary ATCA jurisprudence works, highlighting how a "law of nations" norm is defined. Part II discusses how the established limitations on the dumping of hazardous waste in developing nations amount to a norm of customary international law—a law of nations. Part III examines how dumping, as a law of nations violation, could serve as a basis for action under the ATCA. As a secondary concern, Part III identifies how

37. Hazardous waste dumping is a "toxic tort." *See* Rory A. Valas, *Toxic* Palsgraf*: Proving Causation when the Link Between Conduct and Injury Appears Highly Extraordinary*, 18 B.C. ENVTL. AFF. L. REV. 773, 778-79 (1991) ("A plaintiff claiming damages for a toxic tort can attempt to bring a common law action applying any or all of the following theories of liability: trespass, negligence, nuisance, or strict liability. Most plaintiffs claiming personal injury from hazardous wastes must attempt to prove that the defendant was negligent. To prevail on a negligence claim, the plaintiff must prove four distinct elements. First, the plaintiff must establish that the defendant owed a duty of due care to the plaintiff. Second, the plaintiff must prove that the defendant breached the duty. Third, the plaintiff must convince the factfinder that the plaintiff suffered actual damages due to defendant's breach of duty of due care. Fourth, the plaintiff must show that the defendant's breach was the cause of the plaintiff's damage. Causation is the element that creates the greatest misunderstanding among those involved in toxic tort litigation."); *see also* Shelly Brinker, *Opening the Door to the Indeterminate Plaintiff: An Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs*, 46 UCLA L. REV. 1289 (1999) (discussing hazardous waste dumping as a toxic tort); Clifford Fisher, *The Role of Causation in Science as Law and Proposed Changes in the Current Common Law Toxic Tort System*, 9 BUFF. ENVTL L.J. 35 (2001) (using hazardous waste dumping as an example of a toxic tort when discussing the difficulty of proving causation in toxic tort litigation); *cf.* Mouton v. State, 525 So. 2d 1136, 1142 (La. Ct. App. 1988) (finding that the tortious "'conduct' of 'generator' defendants was the deposit of . . . wastes on plaintiff's land). *See generally* Mary Elliott Rollé, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO. INT'L ENVTL. L. REV. 135, 201 (2003) (arguing that "the international community should work toward creating a new, separate and distinct forum" for litigating toxic torts).

38. *See* Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1, 2 (2003) ("Until environmental law is recognized as part of the 'law of nations,' as human rights law is, there can be no actionable violations of environmental law under the ATCA.")

certain procedural and liability concerns, commonly at issue in ATCA cases, would be likely to play out in an anti-dumping ATCA suit. Finally, the Conclusion highlights how such an ATCA dumping suit could uniquely further recovery for tort violations of international environmental law.

I. CONTEMPORARY ATCA JURISPRUDENCE: HOW A "LAW OF NATIONS" NORM IS DEFINED

ATCA jurisprudence follows and responds to two central court cases—*Filartiga v. Pena-Irala*[39] and *Sosa v. Alvarez-Machain*[40]—that lay out how a "law of nations" norm is defined. Much has been written about the reemergence of the ATCA in the 1980s after *Filartiga* was decided. However, the necessity for summarizing the three decades of jurisprudence and prolific academic theory in *Filartiga*'s wake was to a large extent short-circuited by *Sosa* in 2004. *Sosa* was the second time the Supreme Court heard an ATCA case,[41] and it generated a great deal of academic debate, primarily among scholars attempting to determine the scope of permissible "law of nations" claims.[42] Ultimately, much scholarship has concluded that, while the district courts may be inclined to be careful about extending the ATCA to new "law of nations" claims, the courts are necessarily open to new "law of nations" claims after *Sosa*.[43]

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39. 630 F.2d 876 (2d Cir. 1980). For a history of the ATCA and efforts to apply it to remedy environmental abuses, see Richard L. Herz, *Litigating Environmental Abuses Under the Alien Torts Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000).

40. 542 U.S. 692 (2004).

41. The Supreme Court previously analyzed the ATCA in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

42. *See, e.g.*, Genc Trnavci, *The Law of Nations Under the Alien Tort Claims Act and the U.S. Case Law*, 19 EMORY INT'L L. REV. 143, 166 (2005) ("While recognizing a claim under the law of nations as an element of federal common law as an exception to the *Erie* rule, the Supreme Court in *Sosa* was quick to emphasize good reasons for a restrained conception of the discretion that a federal court should exercise in considering such a new cause of action."); Gerald Weber, *The Long Road Ahead:* Sosa v. Alvarez-Machain *and "Clearly Established" International Tort Law*, 19 EMORY INT'L L. REV. 129, 129 (2005) ("In *Sosa v. Alvarez-Machain*, the Supreme Court opened a trickle-gate for 'international tort' lawsuits. Many have and will speculate about the future of Alien Tort Statute ('ATS') litigation in the wake of *Sosa*.").

43. *See* Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 286 (2006) ("ATS actions are not limited to cases involving 'violation of safe conducts, infringement of the rights of ambassadors, and piracy,' but any new causes of action must derive from norms of international law as widely accepted and as definite in content as those three would have been in 1789. In a sense, ATS causes of ac-

Since in *Sosa* the Supreme Court favorably cites and arguably adopts *Filartiga*,[44] it is helpful to first identify the central language and concepts of the *Filartiga* decision.[45] In *Filartiga*, the Second Circuit held that the ATCA provides federal jurisdiction over tort suits by aliens for violations of "universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[46] As authority for its position that torture violates an accepted norm of international law, the Second Circuit cited to the United Nations Charter, a General Assembly Resolution on torture, and a number of conventions on human rights.[47] The Second Circuit found the international prohibition on torture to be "clear and unambiguous."[48] Of

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tion arise out of very strong, very well accepted international law."); Carolyn A. D'Amore, Note, Sosa v. Alvarez-Machain *and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 617 (2006) ("The Supreme Court preserved some opportunities for future ATS claims by deciding *Sosa* on the basis that the alleged customary international law that *Alvarez-Machain* relied upon did not achieve a standard of universal specificity and resemblance to the 1789 version of the law of nations. The slightly ajar door of the *Sosa* decision implicitly allowed federal courts to determine which claims might be included in the jurisdiction of the ATS; the plurality declined to establish a body of actionable claims with any precision."); *see also* Virginia Monken Gomez, Note, *The* Sosa *Standard: What Does It Mean for Future ATS Litigation*, 33 PEPP. L. REV. 469, 499 (2006) ("In deciding *Sosa*, the Supreme Court had the opportunity to close the door completely on the United States' ability to provide a forum for holding human rights abusers civilly liable, but it did not. Instead, the Court affirmed the constitutionality of the ATS and set forth an analytical framework for ascertaining actionable norms under the statute.").

44. *See* Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 820 (2005) (arguing that the Supreme Court adopted the *Filartiga* standard for recognition of customary international law); *see also* Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 270 (E.D.N.Y. 2007) (recognizing that *Filartiga*, "the seminal Second Circuit [ATCA] case . . . is cited repeatedly and favorably in *Sosa*"); Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 463 (S.D.N.Y. 2006) (discussing whether *Sosa* narrows or "endorses" the reasoning in *Filartiga* and concluding that the *Sosa* holding is so narrow that *Filartiga* continues to be controlling law unless particularized facts run afoul of *Sosa*).

45. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004) ("The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala* . . . ." (citation omitted)).

46. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d. Cir. 1980).

47. *Filartiga*, 630 F.2d at 883-84.

48. *Id.* at 884.

additional importance, the Second Circuit held that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[49]

Twenty-four years after *Filartiga*, the Supreme Court in *Sosa* clarified the reach of the ATCA for the first time and held that federal courts could hear ATCA suits based on newly developed norms of international law. Essentially, the Supreme Court adopted the reasoning set out in *Filartiga*, holding: "Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."[50] Any new claim under the ATCA must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[51] Thus, the ATCA limits claims to those where the law of nations is "'universal, definable, and obligatory.'"[52] The Supreme Court recommended caution in adopting the law of nations to private rights of action,[53] but explicitly held that "the judicial power should be exercised on the understanding that *the door is still ajar* subject to vigilant doorkeeping, *and thus open* to a narrow class of international norms today."[54] Thereby, the Court held out the possibility for federal courts to discern newly developed norms of international law as the basis for suits under the ATCA.[55]

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49. *Id.* at 881.

50. *Sosa*, 542 U.S. at 712.

51. *Id.* at 725.

52. Luciana Reali, Alvarez-Machain v. United States: *How Should the Ninth Circuit Determine Which Torts Are Actionable Under the Alien Tort Claims Act?*, 17 N.Y. INT'L L. REV. 51, 61 (2004) (quoting Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995)); *see* Beanal v. Freeport-McMoran, Inc. (*Beanal I*), 969 F. Supp. 362, 370 (E.D. La. 1997) ("To be recognized as an international tort under § 1350, the alleged violation must be definable, obligatory (rather than hortatory), and universally condemned.")

53. The Supreme Court recommended caution on five grounds: (1) that the "prevailing conception of the common law" has changed since 1789"; (2) that there are *Erie* considerations involved; (3) that the creation of a private right is "better left to legislative judgment"; (4) that such a step has vast implications for foreign relations; and finally, (5) that the Court has "no congressional mandate to seek out and define new and debatable violations of the law of nations." *Sosa*, 542 U.S. at 725-28.

54. *Id.* at 729 (emphasis added).

55. *See* Kyle Rex Jacobson, *Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes*

Newly developed norms of international law, which are "specific, universal, and obligatory"[56] so as to properly form the basis of an ATCA claim, can be recognized on a variety of grounds. "After *Sosa*, it is incontrovertible [that] jurisdiction . . . can be found only if the claim implicates a law of nations norm that is as clearly defined and accepted among civilized nations as the historical models recognized when the [ATCA] was enacted."[57] Courts determine whether there is international consensus about a norm by examining the "customs and usages of civilized nations based on widely accepted international agreements, resolutions of international organizations, the works of jurists and commentators, United Nations documents, and international conventions."[58] For example, in *Sarei v. Rio Tinto, PLC*, the Ninth Circuit held that ratification of the United Nations Convention on the Law of the Sea (UNCLOS)[59] by "at least 149 countries [was] sufficient for it to codify customary international law that can provide the basis of an ATCA claim."[60] Notably, in *Sarei*, the Ninth Circuit held that UNCLOS represented a codification of customary international law—a law of nations basis for an ATCA claim—even though the United States had not ratified UNCLOS.[61] The court found that UNCLOS "[implicates] 'specific, universal

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and Crimes Against Humanity, 56 A.F. L. REV. 167, 214-15 (2005). The *Sosa* opinion did not specify which violations of international law norms were actionable, leading the district courts to reach quite divergent opinions, even as to the cognizance of claims of torture and extrajudicial killings. *Compare* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1251 (11th Cir. 2005) (holding that plaintiffs "can raise separate claims for state-sponsored torture under the [ATCA] and also under the [TVPA]"), *and* Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005) (recognizing claims of torture and extrajudicial killing under ATCA), *with* Enahoro v. Abubakar, 408 F.3d 877, 885 (7th Cir. 2005) (construing *Sosa* to limit relief against torture and extrajudicial killing to the TVPA and dismissing plaintiffs' torture claim brought solely under the ATCA).

56. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1132 (C.D. Cal. 2002).

57. *See* Padilla-Padilla v. Gonzales, 463 F.3d 972, 979 (9th Cir. 2006) (stating that in order to assert a claim under the ATCA, plaintiffs should point to a "binding obligation under international law that has been violated").

58. John Alan Cohan, *Environmental Rights of Indigenous Peoples Under the Alien Tort Claims Act, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution*, 20 UCLA J. ENVTL. L. & POL'Y 133, 151 (2001-02).

59. United Nations Convention on the Law of the Sea pt. XI, art. 210, Dec. 10, 1982, 1833 U.N.T.S. 387.

60. *Sarei*, 456 F.3d at 1078.

61. James Boeving argues unpersuasively that the *Sosa* Court rejected treaty-as-custom arguments, such as those relied upon in *Sarei*. James Boeving, *Half Full . . . or Completely Empty?: Environmental Alien Tort Claims Post* Sosa v.

and obligatory norm[s] of international law' that properly form the basis for ATCA claims."[62] In order to identify customary international law, courts "look to international instruments setting forth 'clear and unambiguous rules,' and to other indications of widespread compliance motivated by a sense of legal obligation, by the nations of the world."[63] In *Filartiga*, the Second Circuit relied upon the United Nations Charter, the Universal Declaration of Human Rights, "numerous" other "international treaties and accords," and judicial opinions.[64] Because the *Sosa* Court cited *Filartiga* positively, these sources of authority continue on, at least implicitly, as persuasive authority for a new norm.

In *Sosa*, the Supreme Court chose not to formulate particular boundaries and explicit requirements for what authority would qualify a norm as a customary norm of international law. Accordingly, there are no hard and fast rules operating in future ATCA suits on claims of newly developed customary norms. The *Sosa* Court "looked to various international law sources, including binding treaties, customary international norms, and authoritative statements, such as the Restatement (Third) of Foreign Relations Law, to determine whether there was a violation of the 'present-day law of nations."[65] Plaintiffs learn from *Sosa* that customary norms must be defined with great specificity—the specificity comparable to eighteenth century paradigms. The post-*Sosa* case law has yet to present a clear model of how

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Alvarez-Machain, 18 GEO. INT'L ENVTL. L. REV. 109, 138 (2005). He relies for this proposition on the Supreme Court's rejection of Alvarez-Machain's claims based upon the Universal Declaration of Human Rights and the ICCPR. The Supreme Court rejected Alvarez-Machain's claims because the authority he cited did not amount to a "rule so broad [that it] has the status of a binding customary norm today." *Sosa*, 542 U.S. at 735. The Supreme Court did not reject his reliance upon treaty-as-custom arguments; rather, the Supreme Court indicated that such arguments are useful indicators that do not necessarily stand alone.

62. *Sarei*, 456 F.3d at 1078 ("*Sosa*'s gloss on this standard does not undermine the district court's reasoning.")

63. Igartua-De La Rosa v. United States, 417 F.3d 145, 175-76 (1st Cir. 2005) (Torruella, J., dissenting) (arguing that the "ICCPR, the UDHR, the American Declaration, the ACHR and the IADC are all evidence of the emergence of a norm of customary international law with an independent and binding juridical status").

64. Filartiga v. Pena-Irala, 630 F.2d 876, 882-84 (2d Cir. 1980).

65. Aldana v. Del Monte Fresh Produce, N.A., Inc., 452 F.3d 1284, 1285 (11th Cir. 2006) (Barkett, J., dissenting); *cf.* United States v. Yousef, 327 F.3d 56, 103 (2d Cir. 2003) ("[W]e look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States.").

one would adequately plead such specificity.[66] Still, following *Filartiga*, it seems plaintiffs will need to offer a breadth of detailed and precise authority.[67]

II. The International Norm Against Dumping as a "Law of Nations": Definition and Consensus

The prohibition against dumping of hazardous wastes in developing countries[68] has developed into a customary norm of international law within the terms of ATCA jurisprudence. The anti-dumping norm is specifically defined in a widely accepted multilateral treaty.[69] Moreover, this customary international norm is buttressed by international consensus, as demonstrated by a U.N. convention,[70] regional conventions,[71] and national implementing legislation.[72]

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66. The case law does indicate that "ambiguous standards" of international practice do not constitute law of nations violations. *See* Saperstein v. Palestinian Auth., No. 1:04-cv-20225-PAS, 2006 WL 3804718, at *8 (S.D. Fla. Dec. 22, 2006) ("This includes such unspecific conduct as 'violence to life,' 'cruel treatment' and 'outrages upon personal dignity.' For federal courts to interpret such ambiguous standards to assess its [sic] own subject matter jurisdiction would pose problems for federal courts and would not meet the defined standards of specificity that *Sosa* requires."); *see also* Mwani v. Bin Ladin, No. CIV A 99-125 CKK, 2006 WL 3422208, at *3 (D.D.C. Sept. 28, 2006) ("[I]n order for a present-day contravention of the law of nations to be more than merely colorable, the specificity and acceptance of such violations must equal those accepted when the ATCA was adopted in 1789.").

67. Discussing declaratory recognition of a norm based on the *Filartiga* standard, Professor Osofsky argued: "This recognition ideally would take the form of uncontroversial General Assembly Resolutions, a few regional treaties, incorporation by many nations, scholarly support, and some form of U.S. governmental acknowledgement." Osofsky, *supra* note 18, at 368.

68. While there is a norm against dumping hazardous wastes, regardless of whether the dumping occurs in a developed or developing country, the Ban Amendment and various regional treaties, including the Bamako Convention, emphasize the particularly egregious nature of dumping in a developing country—elevating dumping in a developing country into a customary norm of international law. *See, e.g.*, Amendment to the Basel Convention, Decision III/I, U.N. Doc. UNEP/CHW.3/35 (Nov. 28, 1995) [hereinafter Ban Amendment] (in which the parties that signed the Basel Convention agreed to an immediate ban on exporting hazardous waste from OECD to non-OECD countries).

69. *See* Basel Convention, *supra* note 32.

70. *Id.*

A. Defining the Norm Against Dumping

The Basel Convention, which deals with the transboundary movement of hazardous waste,[73] is the foremost instrument defining the norm against hazardous waste dumping. The Basel Convention was enacted, in large part, in response to a hazardous waste dumping crises in the 1980s.[74] Essentially, the Basel Convention requires the environmentally sound disposal of hazardous waste and provides a mechanism whereby states can monitor and/or refuse the importation of hazardous wastes. Article 9 of the Basel Convention is of primary importance to potential ATCA dumping claims, because Article 9 deals expressly with illegal traffic in hazardous wastes.

Article 9—"Illegal Traffic"—defines illegal traffic to include "any transboundary movement of hazardous wastes or other wastes . . . that results in deliberate disposal (e.g., dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law."[75] Even this straightforward definition of illegal traffic recognizes that dumping occurs in contravention of "general principles of international law."[76] Under the Convention, when an instance of the transboundary movement of hazardous waste is determined to have been illegal traffic, the waste must be removed by the responsible party—whether that is the exporter, generator, or "State of Export."[77] If the waste was dumped by the

71. *See* Secretariat of the Basel Convention, Article 11, http://www.basel.int/ article11/index.html (last visited Oct. 15, 2007) (providing the text of "Regional Agreements . . . as Transmitted to the Secretariat").

72. *See* Secretariat of the Basel Convention, National Legislation, http://www.basel.int/legalmatters/natleg/index.html (last visited Oct. 15, 2007).

73. The 1987 Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes, a soft law instrument, "graduated into [a] hard law" instrument in the 1989 Basel Convention. BHARAT H. DESAI, INSTITUTIONALIZING INTERNATIONAL ENVIRONMENTAL LAW 116 (2004).

74. In the 1980s, a variety of dumping scandals came to light, particularly with regard to hazardous waste dumping in Africa. For example, between 1984 and 1986, the Soviet Union dumped several tons of radioactive waste in Benin. *See* Benin Hazardous Waste, http://www.american.edu/ted/benin.htm (last visited Dec. 5, 2007). Additionally, scandals such as the "Philadelphia fly ash," where toxic waste was dumped in Kassa Island, Guinea, and the "Italian scandal," where hazardous wastes were dumped in Koko, Nigeria, made international news. *See* Cyril Uchenna Gwam, *Adverse Effects of the Illicit Movement and Dumping of Hazardous, Toxic, and Dangerous Wastes and Products on the Enjoyment of Human Rights*, 14 FLA. J. INT'L L. 427, 437 (2002).

75. Basel Convention art. 9, *supra* note 32, at 136-37

76. *Id.* art. 9.1(e), at 137.

77. *Id.* art. 9, at 136-37.

importer or disposer, the "State of Import" must see to the environmentally sound clean up and disposal of the waste.[78] The Basel Convention further provides that if responsibility for the illegal traffic cannot be assigned, then all parties are to cooperate together to see that the waste is properly disposed.[79] The Basel Convention considers illegal traffic to be a crime and encourages each party to introduce national or domestic legislation to prevent and punish illegal traffic.[80] Consequently, the significance of Article 9 is to support the idea that dumping is a violation of international law.

As highlighted by the *Sosa* opinion, law of nations violations must be defined with specificity. This requirement of specific definition might present the greatest hurdle for plaintiffs if courts misconstrue definition of a norm with definition of a scientific term within that norm. There is not always consensus about which wastes qualify as hazardous. Even within the European Union and the member states of the Organization for Economic Cooperation and Development (OECD), definitions of "hazardous waste" vary.[81] Still, the Basel Convention does establish clear baseline standards for substances that qualify as hazardous wastes.

Hazardous wastes are defined, in Article 1.1(a) of the Basel Convention, as wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics listed in Annex III. Annex I of the Basel Convention lists the categories of wastes to be controlled. Annexes VIII and IX of the Basel Convention are an elaboration and clarification of the provisions of Article 1.1(a) and provide useful clarification of the scope of Annex I.[82]

Additionally, under Article 1.1(b), hazardous wastes regulated by the Basel Convention include wastes defined as or considered to be hazardous by the states of export, import, or transit in those states' domestic legislation. So, under the Basel Convention, whether a dumped material counts as a hazardous waste will turn on a case-by-case factual inquiry.

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78. *Id.* art. 9.3, at 137.

79. F.O. Vicuna, *Current Trends in Responsibility and Liability for Environmental Harm*, *in* PROTECTION OF THE ENVIRONMENT FOR THE NEW MILLENNIUM 127, 144 (Kalliopi Koufa ed., 2002) (discussing the Basel Convention's provision for both strict liability and fault-based liability).

80. Secretariat of the Basel Convention, Illegal Traffic, http://www.basel.int/ legalmatters/illegtraffic/index.html (last visited Oct. 15, 2007).

81. Gwam, *supra* note 74, at 431.

82. Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Sixth Meeting, Geneva, Switz., Dec. 9-13, 2002, *Report*, dec. VI/15 app. ¶ 20, at 78, 81, U.N. Doc. UNEP/CHW.6/40 (Feb. 10, 2003), *available at* http://www.basel.int /meetings/cop/cop6/english/Report40e.pdf.

Despite the potential difficulties inherent in defining what constitutes hazardous waste, courts should not be deterred from considering the customary international norm against dumping as a law of nations violation. Although courts will clearly adjudicate whether a particular waste qualifies as hazardous under case-specific facts, that adjudication should not undermine recognition of the international norm: whether a particular substance is hazardous is a question of whether the international norm applies in a given case, not a question of whether the international norm exists. The law of nations norm encapsulated in the Basel Convention certainly does exist and is defined with specificity: hazardous wastes should not be dumped in contravention of international law.[83]

B. International Consensus Against Dumping Hazardous Waste in Developing Countries

The Basel Convention has received broad acceptance by the international community.[84] Currently, there are 170 parties to the Basel Convention.[85] Moreover, the Basel Convention stands with a variety of bilateral and multilateral treaties, alongside national implementing legislation, demonstrating the international consensus that dumping hazardous wastes in developing countries is a violation of customary international law. Together, these instruments are indicative of international consensus.[86]

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83. The norm that hazardous wastes should not be dumped in contravention of international law is substantially well-defined, particularly in comparison to claimed norms that have not met the "well-defined" threshold. *See* Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752, at *2 (N.D. Cal. Aug. 22, 2006) (noting that courts have rejected ATCA claims based on a "right to life," "right to health," or "intranational pollution").

84. *Cf.* Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 271 (E.D.N.Y. 2007) ("[I]n order for a rule to become a norm of international law, States must universally abide by or accede to it. . . . The question is not one of whether the rule is often violated, but whether virtually all States recognize its validity.").

85. Secretariat of the Basel Convention, Basel Convention's Ratifications, http://www.basel.int/ratif/convention.htm (last visited Oct. 15, 2007); *cf.* Flores v. S. Peru Copper Corp., 414 F.3d 233, 256 (2d Cir. 2003) ("Treaties . . . are proper evidence of customary international law because, and insofar as, they create *legal obligations* . . . on the States parties to them."); *Almog*, 471 F. Supp. 2d at 273 ("Treaties ratified by at least two States provide some evidence of the law of nations; if enough States ratify a treaty, a norm of international law may be established. The more States that have ratified a treaty, especially those States with greater relative influence in international affairs, the greater the treaty's evidentiary value.").

86. In addition to being specifically defined and supported by international consensus, norms of customary international law must be "obligatory." The "obligatory" requirement means only that the norm must rest on a legal obli-

First, since Article 9 works in concert with the Basel Convention as a whole to prevent hazardous waste dumping, it is important to examine the Basel Convention's overall regulatory framework. The Basel Convention enables states to protect their citizens from dumped waste by preventing the forced imposition of hazardous wastes on developing countries. Importantly, the Basel Convention establishes notification procedures requiring exporting states to gain permission from the state of import prior to sending their hazardous waste to the importing country.[87] States may refuse to accept hazardous waste or choose to accept the waste subject to conditions.[88] Furthermore, the Basel Convention provides that "[e]ach Party shall require that hazardous wastes or other wastes, to be exported, are managed in an environmentally sound manner in the State of import or elsewhere."[89] Thus, both the exporter and importer of waste are responsible for its environmentally sound disposal. That the Basel Convention mandates such joint responsibility clearly indicates the importance of safe, legal disposal of waste to the international community, as no state is able to send its waste off to travel the oceanic abyss and simply shrug its shoulders. Likewise, the Basel Convention requires that the transboundary movement of "hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement."[90] Overall, the Basel Convention's aspiration is to minimize the transboundary movement of waste.[91] Under the terms of this multilateral convention, preventing illegal traffic is a baseline requirement.

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gation, rather than on general moral or political grounds. *See* Weiss v. Am. Jewish Comm., 335 F. Supp. 2d 469, 476 (S.D.N.Y. 2004); *see also* In re S. African Apartheid Litig., 346 F. Supp. 2d 538, 552 (S.D.N.Y. 2004) (holding that customary international law norms must be based on "binding international law"). The breadth of treaties and national implementing legislation demonstrate that the norm against dumping has been enacted into law.

87. Basel Convention art. 6, *supra* note 32, at 134-36.

88. *Id.* art. 6.2, at 134.

89. *Id.* art. 4.8.

90. *Id.* art. 4.2(d).

91. *See* Secretariat of the Basel Convention, Short Description of the Basel Convention, http://www.basel.int/convention/sdescription.html (last visited Oct. 15, 2007) ("Parties are expected to minimize the quantities that are moved across borders, to treat and dispose of wastes as close as possible to their place of generation and to prevent or minimize the generation of wastes at source.").

The Secretariat of the Basel Convention, administered by UNEP, recognizes that effective implementation of the Convention rests in part on the enactment of national legislation to "implement and enforce" the Convention.[92] Article 4.4 of the Basel Convention provides that: "Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention."[93] Consequently, many of the parties—at least one hundred countries[94]—have enacted national legislation implementing the Basel Convention.

This implementing legislation often goes beyond the requirements of the Basel Convention, strengthening the country's ability to prevent illegal traffic within its borders. For example, the Republic of Albania has prohibited the importation of all hazardous wastes.[95] Brazil passed legislation to

92. Secretariat of the Basel Convention, National Legislation, http://www.basel.int/legalmatters/natleg/index.html (last visited Oct. 15, 2007).

93. Basel Convention art. 4.4, *supra* note 32, at 132.

94. Countries enacting implementing legislation include Albania, Andorra, Argentina, Armenia, Austria, Australia, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Cambodia, Cameroon, Canada, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kenya, Kyrgyzstan, Latvia, Lichtenstein, Lithuania, Luxemburg, Macedonia, Malaysia, Maldives, Mali, Malta, Mauritius, Mexico, Micronesia, Moldova, Monaco, Morocco, Mozambique, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Paraguay, Philippines, Poland, Portugal, Romania, Russian Federation, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, Tunisia, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Venezuela, Viet Nam, and Zambia. *See* Secretariat of the Basel Convention, National Legislation, http://www.basel.int/legalmatters/natleg/byparties/frsetmain.html (last visited Oct. 15, 2007).

95. A copy of a decision of the Albanian Counsel of Ministers that "prohibit[s] the importation into the Republic of Albania of hazardous waste" can be found on the website of the Secretariat of the Basel Convention at http://www.basel.int/legalmatters/natleg/albania3.doc (last visited Dec. 7, 2007).

control and, in many cases, prohibit the importation of hazardous wastes.[96] Zambia has prohibited dumping into the aquatic environment.[97]

In 1993, the European Community adopted Directive 259/93 implementing the Basel Convention.[98] Subsequently, the European Union adopted Regulation 120/97,[99] which implements the Ban Amendment to the Basel Convention. The Ban Amendment "bans hazardous wastes exports for final disposal and recycling from what are known as Annex VII countries (Basel Convention Parties that are members of the EU, OECD, and Liechtenstein) to non-Annex VII countries (all other Parties to the Convention)."[100] The Amendment recognizes "that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes."[101]

Additionally, the Basel Convention has catalyzed regional agreements regulating the transboundary movement of hazardous wastes. Regional agreements further demonstrate the international consensus that, without regulation, hazardous waste may well be disposed of in a dangerous and damaging manner. These regional agreements include the Waigani Convention,[102] the Agreement of the Commonwealth of Independent States on the Monitoring of Transboundary Shipments of Hazardous and Other

96. A copy of the relevant Brazilian resolution can be found on the website of the Secretariat of the Basel Convention at http://www.basel.int/legalmatters/ natleg/brazil3.doc (last visited Dec. 7, 2007).

97. A copy of the relevant Zambian act can be found on the website of the Secretariat of the Basel Convention at http://www.basel.int/legalmatters/natleg/zambia01.pdf (last visited Dec. 7, 2007).

98. Council Regulation 259/93, 1993 O.J. (L 30) 1 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993R0259:EN:HTML.

99. Council Regulation 120/97, 1997 O.J. (L 22) 14-15 (EU), *available at* http://europa.eu.int/eur-lex/en/index.htm.

100. Ban Amendment, *supra* note 68.

101. *Id.*

102. Convention To Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and To Control the Transboundary Movements of Hazardous Wastes Within the South Pacific Region, Oct. 21, 2001, 2161 U.N.T.S. 91 [hereinafter Waigani Convention]. The Waigani Convention covers the area including American Samoa, Australia, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Guam, Kiribati, Republic of the Marshall Islands, Nauru, New Caledonia and Dependencies, New Zealand, Niue, the Commonwealth of Northern Mariana Islands, Republic of Palau, Papua New Guinea. Pitcairn Islands, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, Wallis and Futuna, and Western Samoa. *Id.* art. 1, at 95.

Wastes,[103] the Convention on the Protection of the Environment Through Criminal Law,[104] and the Bamako Convention.[105]

The Waigani Convention, which was adopted in 1995, notes "with concern that a number of approaches have been made to certain Island Countries of the South Pacific by unscrupulous foreign waste dealers for the importation into and the disposal within the South Pacific of hazardous wastes generated in other countries."[106] The Waigani Convention provides that "[e]ach Pacific Island Developing Party shall take appropriate legal, administrative and other measures within the area under its jurisdiction to ban the import of all hazardous wastes and radioactive wastes from outside the Convention Area. Such import shall be deemed an illegal and criminal act . . . ."[107] The Convention clearly establishes that the South Pacific accords with international consensus against the dumping of hazardous waste.

Multilateral agreements in Asia and Europe further emphasize international consensus against dumping. For example, the Agreement of the Commonwealth of Independent States on the Monitoring of Transboundary Shipments of Hazardous and Other Wastes is a multilateral implementing agreement between the CIS countries: Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, and Ukraine.[108] "Under this [A]greement, the parties will take measures to regulate the import of wastes into their territory and the transit of hazardous and other wastes through their territory."[109] The

103. Agreement of the Commonwealth of Independent States on the Monitoring of Transboundary Shipments of Hazardous and Other Wastes , Dec. 16, 1999, REPORT OF THE 10TH SESSION OF THE INT'L ECOLOGICAL CONGRESS 59. The orginial text is in Russian; however, an approximate translation is available at http://iea.uoregon.edu/pages/view_treaty.php?t=1996-TransboundaryShipmentsHazardousWastesCommonwealthOfIndpendetStates.EN.txt&par=viewtreaty.html.

104. Commission to the Council of European States, Convention on the Protection of the Environment Through Criminal Law, *opened for signature* Apr. 11, 1998, 172 C.E.T.S., *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/172.htm [hereinafter Protection of the Environment]. This Convention has not yet entered into force, as only thirteen countries are signatories, and only Estonia has ratified the Convention.

105. Bamako Convention, *supra* note 35.

106. Waigani Convention Preamble, *supra* note 102, at 93.

107. *Id.* art. 4, para. 1(a), at 98.

108. Agreement, *supra* note 103.

109. Natural Resource Aspects of Sustainable Development in the Republic of Uzbekistan, http://www.un.org/esa/agenda21/natlinfo/countr/uzbek/nature.htm (last visited Oct. 15, 2007).

Agreement also establishes a regional center to facilitate study and technology transfers related to the regulation of waste traffic.[110] The Council of Europe provides yet another example of consensus against dumping. The Convention on the Protection of the Environment Through Criminal Law, a convention of the Council of Europe, allows for parties to establish criminal or administrative offenses for the unlawful disposal of hazardous wastes.[111] Under the Convention:

> Each Party shall adopt such appropriate measures as may be necessary to establish as criminal offences under its domestic law . . . the unlawful disposal, treatment, storage, transport, export or import of hazardous waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants . . . when committed intentionally.[112]

The Convention also provides for parties to adopt criminal sanctions for negligent acts of dumping.[113] Moreover, the Convention states that corporations may be held both civilly and criminally liable for unlawful dumping.[114]

The Bamako Convention[115] is particularly compelling authority for the international norm prohibiting the dumping of hazardous waste. Since "the African nations lack the technical expertise and the administrative capabilities to monitor, detect, or handle hazardous waste . . . they are susceptible to illegal dumping."[116] The Bamako Convention parallels the Basel Convention by addressing illegal traffic in its own Article 9, adopting and therefore reaffirming the Basel Convention language. The Bamako Convention prohibits "the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties. Such import shall be deemed illegal and a criminal act."[117] The Bamako Convention clearly goes beyond the purview and restrictions outlined in the Basel Convention by placing a ban on the importation of hazardous waste into Africa. Here the parties want so deeply to protect their citizens from dumping that they prohibit importation by non-contracting parties all together. Moreover, the Bamako Convention imposes

110. UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, Rio de Janeiro, 1992, *Johannesburg Summit 2002: Russian Federation Country Profile* 38, *available at* http://www.un.org/esa/agenda21/natlinfo/wssd/Russianfed.pdf.

111. Protection of the Environment, art. 4(c), *supra* note 104.

112. *Id.* art. 2, para. 1(c).

113. *Id.* art. 3.

114. *Id.* art. 9.

115. Bamako Convention, *supra* note 35.

116. Jaffe, *supra* note 32, at 130.

117. Bamako Convention, *supra* note 35, art. 4, para. 1.

strict joint and several liability on the generators of hazardous waste who violate the Convention's terms.[118]

Various conventions prohibiting dumping at sea provide further evidence that the prohibition on dumping is supported by international consensus, elevating the prohibition into a law of nations. For example, parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention 1972) pledged "to take all practicable steps to prevent the pollution of the sea by the dumping of waste."[119] The 1996 Protocol to the London Convention 1972 prohibits dumping waste at sea.[120] There are 81 parties to the London Convention, including the United States, and 30 parties to the 1996 Protocol. The Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, to which Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates are parties, prohibits the dumping of hazardous wastes from ships or airplanes into the sea.[121] UNCLOS Part XI, Article 210 requires that "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping."[122] As of March 5, 2007, 155 countries had ratified Part XI of UNCLOS.[123]

As previously discussed, in *Sarei*, the Ninth Circuit found that UNCLOS codified customary international law to form the basis of an ATCA claim.[124] The United States is not a party to UNCLOS, and as such, the Ninth Circuit's holding that an UNCLOS claim could be adjudicated under the ATCA is particularly strong support for a hazardous waste dumping claim. Furthermore, although the United States has not ratified the Basel Convention,

118. Kimberly K. Gregory, *The Basel Convention and the International Trade of Hazardous Waste: The Road to the Destruction of Public Health and the Environment Is Paved with Good Intentions*, 10 CURRENTS: INT'L TRADE L.J. 80, 82 (2001).

119. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter art. 1, 1972, 104 U.N.T.S. 120.

120. 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter art. 4, Nov. 7, 1996, 36 I.L.M. 1 (1997).

121. Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution art. 5, http://www.basel.int/articleii/ index.html.

122. United Nations Convention on the Law of the Sea, *supra* note 59, at 387.

123. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, The Convention and Agreements, http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm (last visited Dec. 10, 2007).

124. Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1078 (9th Cir. 2006).

the United States need not do so for the Basel Convention to set out a norm of customary international law. While it is of course true that dumping at sea and the illegal traffic into and dumping within a developing country are not identical violations of international law, prohibitions on dumping at sea emphasize international consensus that waste should be disposed of in an environmentally sound manner.

Bilateral and multilateral treaties combine with multitudinous domestic legislation to demonstrate the international consensus against the dumping of hazardous waste. The international consensus against dumping hazardous waste *in developing countries* is particularly strong.[125] This international consensus develops the norm against dumping into a customary norm of international law. As stated in *Filartiga*, "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATCA]."[126] The customary international norm against dumping should qualify as a law of nations violation within the meaning of the ATCA.

III. Prohibition on Dumping as a Law of Nations Violation Actionable Under the ATCA

Dumping in violation of international law is a law of nations violation that can serve as a basis for claim under the ATCA. There are three elements to an ATCA claim. The ATCA provides federal district courts original jurisdiction over (1) "any civil action by an alien" (2) "for a tort only" that is (3) "committed in violation of the law of nations or a treaty of the United States."[127] This Note assumes that victims of dumping in developing nations would be "aliens" and, as previously discussed, that dumping is a cognizable "tort." Plaintiffs cannot pursue claims under the "treaty" prong of the ATCA because the Basel Convention is not self-executing and lacks authorizing legislation in the United States.[128] However, the Basel Convention does

125. *See, e.g.*, Bamako Convention, *supra* note 35.

126. Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980).

127. Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2000).

128. As discussed in *Greenpeace USA v. Stone*:

> In the absence of authorizing legislation, an individual may enforce a treaty's provisions only when it is self-executing, that is, when it expressly or impliedly provides a private right of action .... The Basel Convention has no implementing legislation and is not self-executing. This court has no standards or procedures to judicially enforce the treaty and therefore, plaintiffs' claim under the Basel Convention must fail.

not need authorizing legislation to serve as the cornerstone of the anti-dumping law of nations. The Basel Convention stands in concert with other treaties and with domestic legislation, demonstrating the international consensus that dumping is a violation of "the law of nations."

A. Dumping, as a Law of Nations Violation, Comports with *Sosa*

The *Sosa* opinion indicates that newly developed law of nations violations will have to be defined with specificity comparable to eighteenth-century paradigms.[129] As stated in *Sosa*, as originally drafted, the ATCA applied to "a sphere in which . . . rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships . . . . [T]his narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs[, was] probably on minds of the men who drafted the ATS with its reference to tort."[130] The international dumping of hazardous wastes, while a contemporary issue, falls squarely within that "narrow set of violations," as it both admits of a judicial remedy and certainly threatens serious consequences for international affairs.

Evidence that hazardous waste dumping admits of a judicial remedy is two-fold. First, the Basel Convention outlines a process through which states can adjudicate violations of the Convention.[131] The Basel Convention limits *state* remedies to a removal of dumped materials by the violating state. As previously stated, the Basel Convention does not address tort remedies for private individuals. However, that the Convention anticipates adjudication for state redress indicates that dumping violations are amenable to inquiry and disposition in a court of law. Moreover, allegations of dumping have lead to criminal prosecution in the past.[132] Still, while state remedies and criminal prosecution may succeed in removing the hazardous waste and may also serve as deterrents, these remedies in and of themselves do little to assist the victims of illegal dumping.

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748 F. Supp. 749, 767 (D. Haw. 1990).

129. Sosa v. Alvarez-Machain, 542 U.S. 692, 761-62 (2004).

130. ATS stands for "Alien Tort Statute," which is another term for the Alien Tort Claims Act. *See Sosa*, 542 U.S. at 715.

131. Basel Convention Annex VI, *supra* note 32, at 160.

132. *See* United States of America v. Stickle, 454 F.3d 1265, 1267 (11th Cir. 2006) (affirming conviction for "knowingly discharging an oily mixture into the sea without an oil discharge monitoring system"); *see also* Gail Edmondson & Kate Carlisle, *Italy and the Eco-Mafia: How Billions Are Made Through Dumping Toxic Waste with Little Public Outcry*, BUS. WK., Jan. 27, 2003, at 24 (describing the Greenland/Ecoverde hazardous waste dumping prosecution in Italy).

These victims suffer the types of medical and emotional damages that U.S. courts are accustomed to addressing.[133] The U.S. judiciary is quite capable of handling tort claims arising from dumping.[134] Adjudicating violations of the customary international norm against dumping would fall squarely within the expertise of U.S. courts.

As to *Sosa*'s recognition that, when the ATCA was enacted, violations of the law of nations threatened serious consequences in international affairs, one need look no further than the Côte d'Ivoire crisis to see that dumping threatens such consequences. In Côte d'Ivoire, dumping precipitated rioting in the streets and a virtual collapse of the government. While it is true that the government was to a large extent reinstated, in developing countries with transitional governments—the countries most likely to be victimized by transboundary dumping—government upset may threaten a quick slide back into national unrest, with regional consequences.

When faced with such great environmental harm and its pursuant human health crisis, transitional governments in developing countries like Côte d'Ivoire lack the institutional resources to finance medical care and the clean-up of hazardous waste. For example, in the recent Côte d'Ivoire crisis, the Ivorian government contracted with French authorities to collect the hazardous materials and oversee their clean up and eventual incineration. However, the Ivorian government was simply unable to afford these environmental services. On December 14, 2006 UNEP called upon the international community to provide financial assistance for the cleanup and established a special Trust Fund. The Fund was designed to fast track donations to Côte d'Ivoire to prevent "people of one of the world's poorest countries [from] being forced to pay the bill for removal and clean up operations."[135]

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133. *See, e.g.*, Gregory M. Romano, Note, *"Shovels First and Lawyers Later": A Collision Course for CERCLA Cleanups and Environmental Tort Claims*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 421, 428 (1997) ("Examples of large scale settlements of environmental tort claims stemming from hazardous waste ultimately cleaned up under CERCLA include tort suits for medical and economic harm by 280 residents in the 'Three Mile Island' nuclear disaster, a $20 million 'Love Canal' settlement for 1,300 former and current residents, and a $400,000 settlement for a Chevron McColl dumping site to seventy-eight families in Fullerton, California.").

134. *See, e.g.*, Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988); Plaza Speedway, Inc. v. United States, No. 97-1346, 2001 U.S. Dist. LEXIS 25017 (D. Kan. Apr. 12, 2001); Badalamenti v. Chevron Chem. Co., Civ. A. No. 94-1420, 1995 WL 386868 (E.D. La. June 27, 1995); *cf.* New Jersey v. New York, 283 U.S. 473, 473-74 (1931) ("Obstruction of navigation of fishing and other boats, and injuries to fishing rights and fish nets, due to the dumping of garbage in the ocean by the defendant, are maritime torts.").

135. Press Release, U.N. Env't Programme, Donor Assistance Critical to Côte D'Ivoire Clean-up Efforts (Dec. 20, 2006), *available at* http://www.unep.org/

Accordingly, waste dumping threatens both violence with implications for the international community and international financial repercussions. The customary international norm against hazardous waste dumping thus qualifies under both *Sosa* criteria.

Furthermore, there is a poetic symmetry in highlighting dumping violations for cognizance and remedy under the ATCA. Blackstone identified violations of safe conducts,[136] infringements of the rights of ambassadors, and piracy as three violations of the law of nations addressed by the criminal law of England.[137] Piracy and, to a degree, the rights of ambassadors deal with shipboard crimes. Since hazardous waste is often transported via ship to its dumping ground,[138] this tortious behavior presents itself as a modern day corollary to eighteenth century violations of the law of nations.

B. Procedural and Liability Issues Particular to the ATCA

Of particular importance, ATCA claims are frequently dismissed by the district courts on discretionary grounds. ATCA claims must survive consideration of "international comity," the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[139] Essentially, when a court is considering whether to dismiss a claim on the grounds of international comity, the court considers whether there is an acceptable forum in the foreign country in which the plaintiffs could bring their claims.[140]

Documents.Multilingual/Default.asp?DocumentID=496&ArticleID=5456&l=en.

136. For a discussion of safe conducts, see *Taveras v. Taveraz*, 477 F.3d 767, 772-76 (6th Cir. 2007).

137. 4 WILLIAM BLACKSTONE, COMMENTARIES *68.

138. *See* Maria A. Mazzocchi, Note, Amlon Metals, Inc. v. FMC Corp.: *U.S. Courts' Denial of International Environmental Responsibility*, 9 FORDHAM ENVTL. L.J. 155, 156 (1997) (discussing the infamous *Khian Sea* ship's dumping of toxic incinerator ash); Lillian M. Pinzon, Note, *Criminalization of the Transboundary Movement of Hazardous Waste and the Effect on Corporations*, 7 DEPAUL BUS. L.J. 173, 175 (1994) (discussing the case of the barge *Mobro 4,000*, in which a ship left New York, sailed over 6,000 miles, and, unable to find a port that would accept its waste, returned to New York).

139. Jota v. Texaco Inc., 157 F.3d 153, 159 (2d Cir. 1998) (internal citations omitted).

140. Jennifer L. Heil, Comment, *African Private Security Companies and the Alien Tort Claims Act: Could Multinational Oil and Mining Companies Be Liable?*, 22 NW. J. INT'L L. & BUS. 291, 304 (2002).

ATCA claims must also survive motions to dismiss for *forum non conveniens* and the political question doctrine.[141] These issues are faced by all plaintiffs bringing ATCA claims. Unfortunately, "it remains unclear how often federal courts will burden" ATCA claims with "discretionary judicial doctrines."[142]

Courts may also dismiss an ATCA claim for lack of standing. Plaintiffs with environmental claims may face particular difficulty with standing. The deleterious effects of noncompliance with international environmental treaties like the Montreal Protocol[143] or the Convention on Climate Change may be born by the world's population as a whole. This universality makes it difficult for plaintiffs to demonstrate standing to sue. However, unlike noncompliance with the Montreal Protocol, noncompliance with the Basel Convention harms individual tort plaintiffs in a personal and demonstrable manner. Thus, on at least one procedural front, plaintiffs in dumping suits stand a better chance of admission into U.S. courts than plaintiffs in other areas of international environmental law.[144]

In addition to procedural concerns, ATCA plaintiffs must work through issues of liability. Plaintiffs may, and likely will, wish to bring claims against corporations responsible for dumping, rather than limiting their suits to claims against state actors. The Basel Convention itself does not provide a private right of action against companies violating the treaty. Under the terms of the Basel Convention, exporting parties who violate the Convention are liable for the removal of dumped wastes, rather than for private party tort claims. Article 9 states that wastes are to be "taken back . . . or otherwise disposed of in accordance with the provisions of this Conven-

141. Boeving, *supra* note 61, at 128 ("Instead, because of the nature of ATS claims, courts typically dismiss on discretionary grounds, such as *forum non conveniens*, international comity, the political question doctrine, or the act of state doctrine."); *see also* Elizabeth Barrett Ristroph, *How Can the United States Correct Multinational Corporations' Environmental Abuses Committed in the Name of Trade?*, 15 IND. INT'L & COMP. L. REV. 51, 81 (2004) ("Courts have some discretion to accept cases involving foreign plaintiffs and domestic defendants. However, they have tended to dismiss such cases on bases of forum non conveniens, failure to join indispensable parties, or lack of subject matter jurisdiction.").

142. John Haberstroh, Note & Comment, *In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts*, 10 ASIAN L.J. 253, 265 (2003).

143. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 2987, 2297 U.N.T.S. 179.

144. For a survey of standing rulings in international environmental law, see Carl Bruch, *Is International Environmental Law Really "Law"?: An Analysis of Application in Domestic Courts*, 23 PACE ENVTL. L. REV. 423, 448-51 (2006).

tion."[145] The Basel Convention also outlines procedures for dispute resolution between states. Article 20 provides that parties "shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice."[146] When parties cannot settle their dispute through negotiation, Article 20 outlines procedures for arbitration.[147] Again, this Note does not argue that the Basel Convention itself authorizes tort suits, but rather that the Basel Convention, when considered alongside other textual sources of international law, evidences a developed "law of nations" under which the illegal dumping of hazardous waste violates international norms. As stated in *Sosa*, "it is correct . . . to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations."[148] The ATCA allows U.S. courts to provide a private right of action for law of nations violations.[149]

Whether private parties may be held directly liable or held liable under aiding and abetting or secondary liability claims in an ATCA suit remains an issue.[150] Basically, the argument for private party liability is twofold. First, private parties, including corporations, are capable of violating international law.[151] Although historically only states were liable under international law,

145. Basel Convention art. 9.2(a)-(b), *supra* note 32, at 137.

146. *Id.* art. 20.1, at 145.

147. *Id.* art. 20.2, at 145-46.

148. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

149. *See* Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994); Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980); *cf.* David D. Christensen, Note, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After* Sosa v. Alvarez-Machain, 62 WASH. & LEE L. REV. 1219, 1223 (2005) ("[S]ince World War II, international law has clearly recognized the liability of nonstate actors. Although corporations, like private individuals, do not have equal status with states on the international plane, they still have international duties and responsibilities." (citation omitted)).

150. *See* Anastasia Khokhryakova, Beanal v. Freeport-McMoran, Inc.*: Liability of a Private Actor for an International Environmental Tort Under the Alien Tort Claims Act*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 463, 482-84 (1998); Courtney Shaw, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act*, 54 STAN. L. REV. 1359 (2002) (discussing standards for private party liability in the context of *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000)).

151. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church I*), 244 F. Supp. 2d 289, 309 (S.D.N.Y. 2003) ("While the Second Circuit has not explicitly held that corporations are potentially liable for violations of the law of nations, it has considered numerous cases, as noted above,

customary international law has evolved to hold private parties liable for "violations of the most serious international norms."[152] Second, private parties may be held liable for aiding and abetting government actors[153] or government activity in violation of international law.[154] Private parties may also be held liable for acting under color of governmental authority.[155] In *Kadic v. Karadzic*, the Second Circuit held that "[w]e do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[156] Private party liability was not a component of the *Sosa* case, and so the Supreme Court touched on the issue only in dicta.[157] Still, in the years since *Sosa*, the district courts have, to a large ex-

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where a plaintiff sued a corporation under the ATCA for alleged breaches of international law: *Jota, Wiwa, Bigio,* and *Aguinda.* In each of these cases, the Second Circuit acknowledged that corporations are potentially liable for violations of the law of nations that ordinarily entail individual responsibility, including *jus cogens* violations.").

152. Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752, at *2 (N.D. Cal. Aug. 22, 2006).

153. Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church II*), 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006) ("Aiding and abetting liability is a specifically defined norm of international character that is properly applied as the law of nations for purposes of the [ATCA]. . . . To show that a defendant aided and abetted a violation of international law, an [ATCA] plaintiff must show: (1) that the principal violated international law; (2) that the defendant knew of the specific violation; (3) that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation; (4) that the defendant's acts had a substantial effect upon the success of the criminal venture; and (5) that the defendant was aware that the acts assisted the specific violation.").

154. *Presbyterian Church I*, 244 F. Supp. 2d. 289; *see also* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 480 (2001) (citing the Basel Convention as a treaty that imposes an "international standard of liability on the corporation"). *Contra* In re S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

155. *See* Doe v. Saravia, 348 F. Supp. 2d 1112, 1150 (E.D. Cal. 2004); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386(KMW), 2002 U.S. Dist. LEXIS 3293, at *13 (S.D.N.Y. Feb. 28, 2002). Standards may require that the plaintiff show "some government involvement." Kadic v. Karadzic, 70 F.3d 232, 245 (2d. Cir. 1995).

156. *Kadic*, 70 F.3d at 239.

157. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) ("A related consideration is whether international law extends the scope of liability for a violation

tent, held that private parties, and corporations in particular,[158] can be held liable under the ATCA.[159]

Courts should be wary of potential defenses that the producers and transporters of hazardous waste are not liable for breach of anti-dumping norms because they merely sold their waste to a foreign company and are not responsible for actions by that foreign company. Companies producing and transporting waste may attempt to rely on *Corrie v. Caterpillar, Inc.*, which held that the Caterpillar bulldozer company could not be held liable for merely selling products to a foreign government.[160] Under *Caterpillar*, merely selling a product to a foreign government does not make a company liable for violations of international law by that foreign government. However, it would be a mistake to strictly apply the *Caterpillar* rule to claims for the tortious dumping of hazardous waste in a developing country, because the transboundary movement of hazardous waste is a strictly regulated enterprise under international law and is simply not analogous to the international sale of tractors. Courts will need to make a careful case-by-case determination of the facts. The customary international norms of anti-dumping law require that a state be notified of the import of hazardous waste and officially accept that waste. Companies producing and transporting waste should not be allowed to escape liability by failing to notify the proper authorities within the importing country and then selling their waste to a (possibly fictitious) company to be quickly disposed. Unless companies selling hazardous waste into a developing country follow the norms of international waste exportation, those companies should be held liable for any subsequent dumping of their waste, as the company knew or should have known that the waste could have been disposed of improperly.

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of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.")

158. *See* Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752, at *9 (N.D. Cal. Aug. 22, 2006) ("Both before and after *Sosa*, courts have concluded that corporations may be held liable under the ATS.").

159. For a discussion of private party liability under the ATCA, see *Bowoto*, 2006 WL 2455752 (noting that aiding and abetting liability is generally appropriate under international law but refusing to expand American color-of-law jurisprudence into the ATCA context). *See also* Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1078 (9th Cir. 2006) (noting that "claims for *vicarious liability* for violations of jus cogens norms are actionable under the ATCA.").

160. 403 F. Supp. 2d 1019 (W.D. Wash. 2005). The claims in *Caterpillar* under the ATCA were dismissed because the plaintiff was not an alien. *Id.* at 1026.

It is worth noting that, as the United States is merely a signatory[161] of the Basel Convention and has not ratified the treaty, as previously discussed, the "treaties" prong of the ATCA does not apply.[162] Somewhat ironically, for this particular application, non-ratification of the Basel Convention works in the environmentalists' favor. Under the treaty clause, aliens alleging torts may only bring suit against U.S. defendants, as it would be illogical to hold a foreign defendant in violation of a U.S. treaty.[163] Since the United States has not ratified the Basel Convention, the restrictions of the treaty clause are inapplicable. Under the law of nations prong, alien tort claimants may bring suit against foreign defendants.[164] Although U.S. courts would still be required to have personal jurisdiction over such a defendant, suit under the "law of nations" prong increases the probability that victims will be compensated.

CONCLUSION

Recognition of dumping as a violation of the law of nations cognizable under the ATCA is particularly important now, as stricter domestic environmental laws are resulting in an increased traffic in hazardous waste.[165] As the development of a global market continues "and tough domestic controls raise the costs of hazardous wastes disposal in developed countries, the opportunities and incentives for illegal trafficking of wastes will continue to grow."[166] While the customary international law prohibition against dumping includes dumping in developed countries, developing countries are particularly at risk, as they often lack the technical expertise to handle hazard-

161. *Cf.* Mansour v. Ashcroft, 390 F.3d 667, 681 n.10 (9th Cir. 2004) (Pregerson, J., dissenting) (noting that, because the United States signed the 1989 Convention on the Rights of the Child, it is "obliged under international treaty law to refrain from acts which would defeat the objectives and purpose of the Convention"). Similarly, since the United States has signed the Basel Convention, the United States is obliged to refrain from acts which would defeat its objectives.

162. Boeving, *supra* note 61, at 136 ("[C]laims under treaties are limited to those which are specific and self-executing or incorporated in the United States through domestic implementing legislation.").

163. Carpenter, *supra* note 27, at 38, 46.

164. *Id.*

165. Pierre Portas, *The Basel Convention, Back to the Future*, 6 SUSTAINABLE DEV. L. & POL'Y, Spring 2006, at 38 (2006).

166. Press Release, U.N. Env't Programme, Update on the Abidjan Hazardous Wastes Crisis (Sept. 12, 2006), *available at* http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=487&ArticleID=5347&l=en (quoting UNEP Executive Director Achim Steiner).

ous waste.[167] Dumping hazardous waste in a developing country is a "shockingly egregious" violation of customary international law and comes within the cognizance of the ATCA.[168]

This Note has argued for pursuing the dumping of hazardous waste as a law of nations violation under the ATCA. The international norm against dumping is specifically defined and supported by international consensus such that the norm is a law of nations cognizable under the ATCA. ATCA suits should allow individuals victimized by dumping the relief that is otherwise unavailable in their home nation's courts. Moreover, allowing victims to recover from corporations and state actors should help deter future dumping—with positive effects both for the environment and in the realm of public health. Finally, the law of nations norm against dumping in developing countries is uniquely situated within international environmental law. The anti-dumping norm is specifically defined and benefits from international consensus—giving the norm against dumping a chance to succeed where previous ATCA environmental claims have come up short.

167. Mary Critharis, Note, *Third World Nations Are Down in the Dumps: The Exportation of Hazardous Waste*, 16 BROOKLYN J. INT'L L. 311, 312 (1990).

168. Zapata v. Quinn, 707 F.2d 691, 692 (2d. Cir. 1983) (stating that the ATCA "applies only to shockingly egregious violations of universally recognized principles of international law").